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No.

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In The

Supreme Court of the United States

October Term, 1986

SPRING REALTY CO., DUANE THOMAS CO., 129 FRONT CO., DANIEL KATZ, EDWARD KATZ, 465 GREENWICH STREET ASSOCIATES, INC., V. PONTE & SONS, INC., 77 HUDSON, INC., and E.E.E. HOLDING CORP.,

Appellants,

vs.

NEW YORK CITY LOFT BOARD, CITY OF NEW YORK,

Appellees,

and

STATE OF NEW YORK.

On Appeal from the Court of Appeals of New York

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether Article 7-C of the New York State Multiple Dwelling Law constitutes, on its face, a taking under the Fifth and Fourteenth Amendments of the Constitution, where under said statute:

(a) affected owners must legalize certain commercial ("loft") buildings for residential use without regard to their wishes or to the cost of such legalization;

(b) no source of legalization funds is provided;

(c) affected owners are permitted to pass through to tenants only a portion of the costs of legalization and then only over a period of ten to fifteen years;

(d) generally, tenants in these buildings cannot be evicted, regardless of the illegal residential nature of their occupancy;

(e) there is no obligation on the tenants to remain on the premises and pay the increased rentals once legalization has occurred;

(f) until legalization occurs, a process requiring several years, only one rent increase is permitted, of prescribed limits, and upon legalization, the buildings enter New York's Rent Stabilization system; and

(g) the statute is retroactive in that the buildings under its umbrella are defined as those having three or more families living independently of one another in a "window" period from 1980 to 1981, although the law was enacted on and effective June 21, 1982.

2. Whether Article 7-C of the New York State Multiple Dwelling Law, on its face, constitutes a deprivation of property without due process of law in violation of the Fourteenth Amendment of the Constitution.

3. Whether Article 7-C of the New York State Multiple Dwelling Law constitutes a denial of equal protection of the laws in violation of the Fourteenth Amendment of the Constitution.

4. Whether Article 7-C of the New York State Multiple Dwelling Law impairs the obligations of contract, in violation of Article 1, Section 10 of the Constitution, in that it substantially impairs the provisions of leases.

5. Whether Article 7-C of the New York State Multiple Dwelling Law, insofar as it delegates legislative and other powers to a "Loft Board" consisting entirely of persons acting as private citizens, is in violation of the due process clause of the Fourteenth Amendment.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the New York Court of Appeals. The State of New York, although a named defendant, declined to participate therein.

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No.

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Appellants,

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NEW YORK CITY LOFT BOARD, CITY OF NEW YORK,

Appellees,

and

STATE OF NEW YORK.

On Appeal from the Court of Appeals of New York

JURISDICTIONAL STATEMENT

OPINIONS BELOW

In this action, whereby plaintiffs seek a declaratory judgment

declaring Article 7-C of the New York State Multiple Dwelling Law unconstitutional, appellants moved for summary judgment in their favor before a Special Term of the Supreme Court of the State of New York, County of New York. Said court issued its opinion filed on July 30, 1985, reprinted at page 9a of the appendix and reported at 127 Misc. 2d 1090, 487 N.Y.S. 2d 973, whereby it denied appellants' motion for summary judgment and granted the cross-motion of appellees for summary judgment declaring the aforesaid statute constitutional.

Appellants appealed to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department. That court affirmed the judgment of constitutionality, without opinion (order reprinted at page 4a of the appendix), which affirmance has not yet been reported. Appellants appealed to the New York Court of Appeals, which affirmed the judgment of the Appellate Division. The opinion of the New York Court of Appeals has not been reported and is reprinted at page 1a of the appendix.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals of New York was entered on December 16, 1986, together with its order of remittitur of the record to the Supreme Court, New York County (reprinted at page 18a of appendix). The notice of appeal was filed on March 3, 1987 (reprinted at page 20a of appendix).

This appeal is being docketed in this Court within ninety days from the entry of that final judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

The complaint alleges that appellants are owners in the Borough of Manhattan, City and State of New York of what are commonly referred to as "loft" buildings, which are generally antiquated structures used for commercial purposes (such as

warehousing or manufacturing) and wherein certain portions thereof have been occupied for essentially mixed-use commercial and residential purposes. On June 21, 1982, the New York State Legislature passed Article 7-C of the New York Multiple Dwelling Law, which obligates the owners of such buildings, provided that such buildings have three or more families residing independently of one another between certain dates in 1980 and 1981, to legalize the buildings for residential purposes, whatever the cost. Only a portion of the costs of legalization were permitted to be passed on to the tenants residing therein, and only over a period of ten to fifteen years. No obligation was placed on the tenants to remain in the premises once legalization occurred, and the right of eviction was severely circumscribed. Until legalization occurs, only one rent increase is permitted, within the limits prescribed by an entity consisting of private citizens called the "New York City Loft Board", which was established to administer the law. Upon legalization, which requires a period of several years, these buildings were to enter New York City's Rent Stabilization system. No other buildings of a commercial nature in the State of New York are subject to rent control of any kind.

In 1984, appellants commenced an action in Supreme Court of the State of New York, New York County, whereby they sought a declaratory judgment declaring Article 7-C unconstitutional as in violation of several provisions of, *inter alia*, the United States Constitution. The New York Court of Appeals, citing legislative findings that the statute was supported by a concern that loft buildings were being converted to residential use without compliance with applicable building codes, found Article 7-C to constitute a valid exercise of the police power and rejected appellant's "takings", due process and equal protection claims.

Thus, this case presents to this Court a clear opportunity to consider the question of whether or not a state, under the guise of a rent control statute, may impose such burdens upon owners

of such a selected group as to violate fundamental constitutional rights.[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, § 10:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .

United States Constitution, Amendment V:

> No person shall . . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, § 1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The provisions of Article 7-C of the New York Multiple Dwelling Law appear at page 25a of the appendix.

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1. This case may well constitute a helpful addition to the Court's agreeing to decide the constitutionality of a San Jose, California rent control law alleged to violate owners' rights by requiring them to assume the public burden of subsidizing low-income tenants. *Pennell v. City of San Jose*, No. 86-753.

STATEMENT OF THE CASE

Article 7-C of the New York Multiple Dwelling Law (§§ 280-287), which was enacted by the New York State Legislature on June 21, 1982, attempts to resolve the alleged illegal conversion of certain commercial and manufacturing loft buildings by classifying qualifying loft buildings as "interim multiple dwellings" and by sanctioning the residential occupancy thereof until such time as the owners of the buildings have lawfully converted the lofts to residential use. A Loft Board consisting of private citizens, some of whom may also be governmental employees, is to administer this law.

The law (§ 281) defines an interim multiple dwelling (hereinafter "IMD") as any building, structure or portion thereof which is located in a city of more than one million persons, which at any time was occupied for manufacturing, commercial or non-residential purposes, which lacks a residential certificate of occupancy, and which, on December 1, 1981, was occupied for residential purposes since April 1, 1980 as the residence or home of any three or more families living independently of each other. Such an IMD must also meet certain zoning requirements.

The law (§ 284) requires that an owner of an IMD must take immediate measures to comply with its provisions. Such owner must register the building with the Loft Board; the owner must file an alteration application by March 22, 1983; the owner must take all reasonable and necessary action to obtain an approved alteration permit by June 21, 1983; the owner must comply with the fire and safety provisions of Article 7-B of the Multiple Dwelling Law within eighteen months of obtaining such alteration permit or December 22, 1983, whichever is later, and must take all reasonable and necessary action to secure a residential certificate of occupancy on or before June 21, 1985, which date may be extended twice by the Loft Board, up to twelve months each,

upon good cause shown and upon compliance with the fire and safety standards of Article 7-B. Failure to abide by the compliance schedule (which has been extended by administrative interpretation) may subject an owner to sweeping civil and criminal sanctions.

Article 7-C [§ 285(2)] provides that an owner may petition the Loft Board to exempt the building or a portion thereof from compliance with its provisions if conversion would produce an unreasonably adverse impact on the manufacturing tenant or if the cost of compliance renders legal residential conversion infeasible. The conversion is to be deemed economically infeasible if a reasonable, but not maximum, return on investment is denied the property owner. Only the minimum relief necessary to relieve hardship may be granted; if compliance requires alteration of units, relocation of tenants within the building or redesign of space, such does not constitute hardship. Application for the hardship exemption must be made within nine months of the establishment of the Loft Board (established in 1982).

Conversion costs are to be borne by the landlord. The Loft Board is to promulgate a schedule of the necessary and reasonable costs of legalization [§ 286(5)], which was only done effective December 1, 1985. An owner may attempt to pass on certain of such costs over a ten year period if no interest is involved or over a fifteen year period if a mortgage is involved.

Article 7-C subjects IMD's to a rent stabilization scheme (§ 286). It provides that the rent due, including escalations, prior to compliance by an owner with the health and safety provisions of Article 7-B, shall be the rent payable pursuant to the existing lease or if no lease is in effect, rent increases are to be in conformity with guidelines established by the Loft Board until Article 7-B compliance is obtained. Upon obtaining 7-B compliance, an owner may apply for an increase based upon the cost of compliance.

At that time, the allowable rent shall be "an initial legal regulated rent" (base rent plus cost of compliance plus percentage increase). Such initial legal regulated rent is to be paid pursuant to a residential rent stabilized lease providing for a term of one, two or three years, renewable at the tenant's option. At such time, the landlord has to join a rent stabilization association. Further upward adjustment in rent may be requested from the Loft Board based upon the cost of obtaining a residential certificate of occupancy for the premises. Once compliance is fully achieved, the New York City rent guidelines board is free to determine the rents payable on subsequent renewals.

Basically, no evictions of residential tenants may occur from the premises, except for non-payment of rent, regardless of the illegal nature of the residential occupancy. Article 7-C also expressly contemplates a one-time buy-out of the tenant's fixture improvements [§ 286(6)]. Under Article 7-C, a present occupant may sell, on a one-time basis, fixture improvements made or purchased by him to an incoming tenant provided the occupant first offers such improvements to the owner at their market value. If the owner declines the offer, the incoming tenant is substituted for the outgoing tenant together with all rights accruing under Article 7-C. However, if the owner elects to purchase the outgoing tenant's rights, any such unit subject to rent stabilization solely by its inclusion in Article 7-C is exempt from such article if the building had fewer than six residential units as of June 21, 1982, or may be rented at market value subject to restabilization if such building had six or more dwelling units on June 21, 1982.

The Loft Board has commissioned certain studies regarding IMD's. One study reports the result of a survey of a group of 67 New York City mortgage lenders; 73% of those responding indicated that they would not finance loft improvements under any conditions while the others responded they would finance loft improvements only under various restrictive conditions.

Another study showed that the average residential loft building generates an annual net operating income of only $750 per residential unit where the owner provides heat, or slightly more than $1,000 per residential unit where the owner does not provide heat. Thus, the average residential loft building, where the owner provides heat, generates an annual net operating income of only $6,366.

Although the legislative debates indicated the belief of the sponsors of Article 7-C that it would protect 100,000 tenants, the number of those affected by the law is substantially less. In 1984, there were only approximately 650 registered IMD's, comprising about 3,900 units, affecting approximately 7,800 persons; between 95% and 98% of the buildings were in Manhattan, with the remainder in Brooklyn.

The complaint in this action alleges that Article 7-C deprives appellants of their property without due process of law; that it further violates due process in that it imposes unreasonable conditions on the use of their property; that the statute is unreasonable, arbitrary, without a rational basis and is not reasonably related to an actual evil toward which the statute is allegedly directed; that the statute is not definite and is void for vagueness; that it has destroyed the value of the buildings owned by appellants to a substantial degree, has burdened them with unreasonable hardships, has deprived them of the use of their property and has forced them into businesses not of their choice; the complaint further alleges that Article 7-C singles out owners of loft buildings for discriminatory treatment in an unreasonable, arbitrary and capricious manner, and denies them equal protection of the laws; it alleges that Article 7-C impairs the obligations of contracts; it alleges a taking of private property without just compensation; it alleges an inverse condemnation; and it alleges an improper delegation of legislative powers to the New York City Loft Board. Thus, the federal constitutional questions were

raised at the earliest possible time and reiterated in every brief filed in Special Term, Supreme Court of the State of New York, County of New York and on appeal.

The New York Court of Appeals rejected the constitutional arguments, finding that the statute met a legitimate concern that lofts were being converted to residential use without compliance with applicable building codes and that the statute thus constituted a valid exercise of the police power.

THE QUESTIONS ARE SUBSTANTIAL

This action presents important questions of federal constitutional law, which it is submitted ~~have been~~ erroneously decided by the New York Court of Appeals. Further, analysis of the issues presented herein has been the subject of conflicting decisions of the federal courts of appeals.

This action presents, *inter alia*, important "takings" issues of national significance which require resolution by this Court. One such issue herein concerns the point at which the "taking" occurs; *i.e.*, when regulations which purport to govern and limit the use of real property impermissibly infringe upon the rights of property owners.

However, the questions raised by this appeal extend much further than presented by the usual "takings" cases. These issues basically concern when the rubric of "police power" can be used to deprive property owners of due process and deny to them the equal protection of the laws. The issues further concern whether statutes purporting to control rent can so constitute a deprivation of property rights as to be unconstitutional.

The taking issue is national in scope. Because of the vagueness of Supreme Court rules on the subject, the same federal

constitutional right has been subject to disparate interpretations. When does an action constitute a regulatory taking as opposed to a physical occupation? Is there a difference in the standard by which governmental action must be adjudged depending on whether it is a deliberate exercise of the eminent domain power or regulatory action that results in an incidental taking? There is a lack of a uniform standard for determining the level of regulation which is constitutionally permissible, and consequently, there is a lack of uniformity among courts.

For example, the opinion in *Hall v. City of Santa Barbara*, 797 F. 2d 1493 (9th Cir. 1986) presents an obvious contrast in analysis from that in *Troy Ltd. v. Renna*, 727 F. 2d 287 (3d Cir. 1984).

This Court has stated the test to be applied is whether a given regulation "goes too far". *MacDonald, Sommer & Frates v. Yolo County*, ____ U.S. ____, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). The Court acknowledged in *United States v. Riverside Bayview Homes Inc.*, ____ U.S. ____, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985), that it has "never precisely defined" the circumstances under which land-use regulation may amount to a taking.

Accordingly, this Court is now afforded the opportunity to define the standards governing these and other constitutional issues which are presented by Article 7-C of the Multiple Dwelling Law.

It is submitted that Article 7-C of the New York Multiple Dwelling Law presents the most fundamental constitutional questions relating to the infringement of the rights of property owners. As this Court has indicated that an analysis is essentially an *ad hoc*, factual inquiry, the following is an outline of the

pertinent points of the statute in order to demonstrate the importance of the questions raised.

I.

In imposing on property owners the obligation, against their will, to legalize commercial premises for residential use, Article 7-C of the New York Multiple Dwelling Law deprives such owners of property without due process of law.

Article 7-C imposes upon property owners the obligation to legalize basically commercial premises for residential use. It begins from a premise of retroactivity, in that although the law was enacted and became effective on June 21, 1982, it imposes the obligation of legalization upon owners so long as three or more units were used for residential purposes on December 1, 1981 and were so occupied since April 1, 1980. The law imposes no mandatory limit on the costs faced by owners and imposes this enormous open-ended financial obligation upon owners, without providing any reasonable guarantees that they will be able to secure a return on their invesment.

The statute provides no mechanism wherein landlords can secure the enormous sums required for legalization. As stated, a study conducted for the New York City Loft Board, which administers the law, finds that the overwhelming number of lenders would refuse to provide loans for the legalization of these structures under any circumstances, while a small number may grant loans under circumstances strictly limited as to amount and term. Such finding is obviously a direct consequence of the fact that the buildings affected are basically antiquated, turn-of-the-century structures which have been subjected to a scheme severely limiting the owners' return. Thus, in its most essential terms, Article 7-C mandates the exependiture of huge open-ended sums by owners without providing the source of obtaining those funds.

If owners cannot secure the funds necessary for legalization, they become subject to fines and other penalties and may not be able to obtain rentals from their tenants.

Even if funds are available for legalization, the statute provides no reasonable mechanism for landlords to recoup the funds.

Article 7-C allows the landlord to pass on only certain limited costs of legalization in increased rent to the tenants, basically over a ten to fifteen year period. However, this "pass-through" is illusory.

The Loft Board is delegated with the power of determining the "necessary and reasonable" costs of legalization which may be passed through to the tenants. Owners are not permitted by the statute to pass through their actual costs of legalization, but are only able to obtain what the Loft Board deems "necessary and reasonable", after an unkown period of delays during which the tenants may seek to challenge the owners' figures. As there is no binding pre-certification process, the owners will be unable to determine the amount of any pass-throughs until architects, engineers and attorneys have been hired, plans filed, the work done and the monies paid. Even if an owner were able to pass through the costs of legalization, the owner must bear all the costs and will not be able to retrieve same until the expiration of the ten to fifteen year period. Thus, an owner may have to spend hundreds of thousands of dollars (the average cost of conversion may well range upwards from $50 per square foot) but would receive only some of that back in cheaper dollars in periods extending approximately to the year 2000. Owners would receive no interest on their money.

When the amount of the pass-throughs to the tenants is finally determined, Article 7-C does not obligate the tenants to remain

in the premises or to bear responsibility for any of the costs of legalization. Thus, if owners manage to obtain the funds for legalization and incur all the expenditures, and secure all approvals, the tenants need only remove themselves from the premises to avoid paying substantially higher rentals for space which may not command those sums in the open market. The result is that owners will be left with a huge financial obligation without any reasonable means of return, and the tenants will have no significant obligations. Since these do not constitute luxury apartment buildings, but are generally old buildings formerly used for such purposes as manufacturing or warehousing, it is difficult to understand how these units can command the vastly increased costs inherent in the legalization process. Thus, Article 7-C creates a hugely oppressive economic burden for owners, whereby the cost of legalizing premises is totally disproportionate to the rentals received therefrom.

Article 7-C imposes unreasonable conditions on the owners' use of their property. Thus, the statute provides no reasonable mechanism for securing the removal of alleged residential tenants at the expiration of their leases so that the buildings can be used solely for commercial purposes. These buildings have a large commercial value, and the imposition of a legalization requirement for residential use deprives the owners of the only practical use of their property. In fact, the statute provides that at the expiration of their leases, existing tenants cannot be evicted, but have the absolute right to remain in place so long as they continue to pay rent. The fact that their use of the premises may be illegal does not constitute a ground for eviction.

The alleged hardship exception provided by Section 285(2) of the Multiple Dwelling Law does not provide a reasonable mechanism for alleviation of the burdens imposed by Article 7-C. As of the date of the argument of this action before the New York Court of Appeals in November, 1986, not one hardship

application had been granted. The Loft Board is instructed to grant only the minimum relief necessary to relieve hardship, with the understanding that if compliance is reasonably possible, it should be achieved even if it requires alteration of units, relocation of tenants to vacant space within the building or redesign of space. The statute provides for the hardship application to be submitted no later than nine months after the establishment of the Loft Board, which period has long expired (in 1983), so that it is impossible for a new owner or a late registrant or an owner undergoing changed circumstances to file for a hardship. Further, filing for a hardship requires the expenditure of substantial funds, as the filing fee is $1,000 and an alteration application must be filed before the application can be considered. The standards specified by the statute for an "unjustifiable hardship" are such that it is difficult to comprehend when a hardship application will ever be granted.[2]

Yet another due process violation presented by the statute is that it withholds power by which the Loft Board can adjust rents without unreasonable delay and it further contains an arbitrary imposition of unreasonably low rent ceilings.

The law itself provides for only limited increases under certain circumstances. Section 286 of the statute covers payment of rent prior to compliance with the law, and in essence, provides for payment of the same rent as previously paid.[3] However, costs

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2. It is submitted that the New York Court of Appeals did not adequately review the statute in upholding its constitutionality, as that court stated that no hearings were required on a hardship application, although Section 285(2) of Article 7-C specifically mentions "the hearing date for such application."

3. Pursuant to Loft Board regulations, if the last increase in rent (even if the increase was only in a rent escalator) was made subsequent to December 31, 1979, a rent increase of 7% is the maximum allowed (22% if such increase was between January 1, 1977 and December 31, 1979 and 33% if before January 1, 1977).

have risen far in excess of any rent increases permitted in the relevant time period, and the Loft Board has increased the services required of owners, such as stating its intention to require heat and hot water services 24 hours a day, 7 days a week, regardless of lease provisions, and failing to provide for any increase in rent because of the cost of such increased services. If, for whatever reason, the last rent paid prior to enactment of Article 7-C was substantially below market rental, no allowance is made for such situation.

Article 7-C further actually *decreases* existing rent in material respects, in that owners are deprived of certain kinds of additional rent which they had been previously charging pursuant to leases. Such items of additional rent as a real estate tax escalation and operating expense escalation may no longer be charged, with such additional rentals having been incorporated into a new base rent. Yet, because of the commercial nature of the premises at issue, such escalations were often a primary source of revenue for owners.

With the exception of the one-time increase provided by the aforesaid Loft Board regulations, Article 7-C makes provision for no other increases prior to full legalization, except upon the owner's compliance with Article 7-B standards relating to fire and safety where the owner may apply to the Loft Board for an adjustment of rent. The Loft Board can refuse to adjust rents, and no provision is made for increases to reflect increased costs of living and of operating the premises.

Section 285 of the Multiple Dwelling Law states the owner can recover rent "provided that it is in compliance" with Article 7-C. The issue thus arises whether owners are entitled to any rent if they should not be in compliance, for whatever reasons, minor or otherwise, such as the fact that there may be lack of approvals from other New York City agencies or by delays caused by the

tenants' challeges to the cost of legalization, or by the inability to obtain financing and the like.

Thus, owners are not given the alternative of remaining commercial property owners but are being compelled to be owners of alleged multiple dwellings. If the owners have violated any pre-existing law, whether civil or criminal, by reason of having residential tenants in commercial facilities, they should be willing to bear those consequences. However, that does not permit a leap to a mandate amounting to a virtual taking of their property without compensation and due process, and further amounting to a governmental subsidy for loft tenants at the expense of owners. If the government decides to subsidize the living arrangements of loft tenants, who are principally a well-educated, travelled group of middle-class and above economic status, that is an obligation to be borne by the public generally, if permissible. There is no basis for singling out a particular group, *i.e.*, owners, to bear the burden of subsidizing another group simply because that other group consists of those who may be more vocal in demanding preferential treatment.

Article 7-C constitutes far more than a rent control statute. Rent control does not mandate that owners spend huge sums to convert commercial structures to multiple dwellings, against the owners' wishes, and without any reasonable mechanism for a return of the expenditures. In reality, we are dealing with special legislation whose purpose is to protect a small group of tenants, less than 10,000 in number, who prefer the economies of having a large amount of space for working, together with residential use, in one loft, in a small area of Manhattan. These are not the disadvantaged elements in our society for whom government has often provided special housing programs, as these loft tenants can well afford to live elsewhere in standard housing but choose not to do so in the interest of developing a particular lifestyle.

As this Court stated in *Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962), the term "police power" denotes the time-tested conceptional limit of public encroachment upon private interests, and, except for the substitution of the familiar standard of "reasonableness," this Court has generally refrained from announcing any specific criteria. The present action offers this Court the opportunity to announce criteria by which these and other legislative enactments can be considered. Pursuant to *Goldblatt, supra,* Article 7-C should be held unreasonable because of the insubstantial nature of the alleged menace against which it seeks protection, because of the availability of other less drastic protective steps such as the enforcement of existing civil and criminal penalties, and the losses which owners will suffer from the imposition of the statute.

II.

Article 7-C constitutes a taking of owners' property without just compensation.

An analysis under the "takings" clause of the Constitution calls for "essentially *ad hoc,* factual inquiries". *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Resolving whether public action works a taking involves several factors such as the economic impact of the regulation, the extent to which it interferes with investment backed expectations, and the character of the governmental action. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

Article 7-C constitutes a taking in numerous respects. In Section 286(5) of the Multiple Dwelling Law, Article 7-C requires that the Loft Board determine the costs "necessarily and reasonably incurred" in obtaining compliance with the law pursuant to "a schedule of reasonable costs to be promulgated

by it." Thus, the law imposes an open-ended financial obligation upon landlords to legalize the premises. However, the owner must seek permission from the Loft Board to add these costs to the rents. The Board is under no obligation to permit the owners' actual costs of compliance to be passed along, but limits the pass-along to what the Board deems to be reasonable. This constitutes a substantial facial defect of the statute. The Loft Board regulations provide for a schedule of costs, without regard to the kind of labor used by a particular owner.[4] Thus, to the extent the owners' costs of legalization exceed the costs permitted by the Loft Board, a taking has occurred.

A taking has occurred further in the sense that a huge economic value has been taken from the owners, constituting an interference with their economic expectations that upon expiration of all leases, they would have vacant buildings which could be remodelled, demolished, sold or otherwise disposed of as the owners might desire.

It has become impossible for owners to reap commercial returns because they cannot rent the premises, now occupied by residential loft dwellers, at commercial rates, nor can they lease or sell the buildings for commercial development. Under the guise of an exercise of the police power, the statute forces the owner to assume the cost of providing a benefit to the "public" without recoupment.

This Court is presented with the opportunity to decide the issue of whether Article 7-C presents a regulatory taking case or

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4. By regulation, attorneys' and accountants' fees are limited to a small percentage of costs, regardless of the actual amount billed and paid. Conversion of manufacturing space in New York City, may, under the local zoning resolution, subject an owner to the payment of hundreds of thousands of dollars in conversion fees to a special fund (called "BRAC"); although mandated by law, these fees are not permitted to be passed along.

one involving a physical occupation of property. *See e.g., Hall v. City of Santa Barbara, supra*, 797 F. 2d 1493 (9th Cir. 1986). In that action, the allegations of the complaint were deemed to present a claim for taking by physical occupation, because the Santa Barbara ordinance in question transferred the possessory interest in the owner's land to each of the tenants, consisting of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent, which interest was found to be transferable with an established market value. Under Article 7-C, the effect of the statute is similarly to transfer a possessory interest in the buildings to the tenants. The owners are severely circumscribed in their ability to evict the tenants; the tenants are in effect given the right to occupy the property in perpetuity at limited rentals; and the tenants can also transfer their rights to other parties by virtue of what has commonly become to be known as "key money", which is the price one loft tenant pays another for the right to inhabit the unit.

While Article 7-C gives the owners the opportunity to buy the departing tenants' fixtures at fair market value, that in effect requires an owner to buy his own property and therefore does not eliminate the constitutional infirmity presented by the statute. Basically, if an owner does not wish to buy the tenants' fixtures, he will have no control as to who will live in the property now or in the future. Therefore, it is the tenant who is deriving the economic benefits of the leasehold and, as in *Hall, supra*, he is in effect given an economic interest in the land that he can use and give away at his pleasure. As in *Hall, supra*, Article 7-C goes far beyond an ordinary rent control scheme and leaves owners with the right to collect reduced rent while tenants have practically all other rights in the property they occupy. This oversteps the boundaries of mere regulation and shades into permanent occupation of the property.

III.

Article 7-C deprives owners of the equal protection of the laws.

There is no rational basis for treating owners of buildings containing three or more residential units during the "window" period from 1980 to 1981 differently from other owners of property in the City of New York, whether commercial or residential. Article 7-C has as its real purpose the protection of a particular class and not the general public. Thus, the statute in effect protects one class of citizens against another, at the expense of that other class. Although appellants are not substantially different from other owners of commercial buildings in the City of New York, Article 7-C singles them out for treatment in an arbitrary manner.

As stated, Article 7-C imposes an economic burden on a class of owners singled out for discriminatory treatment. Secondly, owners affected by Article 7-C are discriminated against because, unlike other commercial property owners similarly situated, they are forced to subsidize the rentals of their tenants; the Article impermissibly introduces a form of commercial rent control.

Article 7-C permits "residential occupants" to use the space in the loft unit as combined residence/work space, without regard to how the space is allocated to living or work areas. No distinction is made in terms of permitted rental rates and/or increases between loft units occupied for the purpose of carrying out activities of a commercial nature and units occupied solely as a residence. No other class of private real property owners within the state is forced to subsidize commercial tenants nor to accept commercial rentals at reduced, regulated rates pursuant to a rent regulation scheme.

IV.

Article 7-C unconstitutionally impairs the obligations of contracts.

Plaintiffs were and/or are parties to commercial leases with their tenants. The tenants agreed to occupy their premises for a specific term according to specific conditions such as supply of heat and other services during particular hours, and for purposes limited to commercial use such as an artist's studio. However, Article 7-C impairs the obligations of these contracts in that it eliminates the provisions thereof relating to purpose, services and term. The statute gives tenants a virtually unlimited term of occupancy, for any residential and/or commercial purposes. As aforesaid, these owners had real estate tax and operating expense escalations in their leases, pursuant to which they derived substantial revenues as the cost of operations increased. However, Article 7-C incorporates these escalations into a new base rent and abolishes them for the future.

The typical form of loft lease also contains a provision against subletting or assignment without the owner's prior written consent. However, Article 7-C (in regulations promulgated thereunder by the Loft Board) has in effect abolished such provisions by not requiring consent, by requiring the owner to legalize space occupied by sub-tenants and by setting the sub-tenants' rent as basically that which the sub-tenant paid to the prime lessee.

Article 7-C (in regulations promulgated by the Loft Board) mandates the supply of services such as heat and hot water toward the goal of 24 hour a day, 7 day a week residential services, although the leases freely entered into specify otherwise. Even when the services specified in the lease are above the minimum specified by the Loft Board, the owners are not permitted to reduce services to the Loft Board's level.

Article 7-C makes no difference in its application as to whether the landlord knew or did not know of residential use of commercial premises. Thus, if a tenant violates a lease agreement and resides in the premises illegally, although the owner is either unaware or is opposed to it, that owner is in the same position as if it actively encouraged the residential use. The statute therefore provides tenants with an incentive to reside illegally in commercial premises and breach their contractual obligations.

The questions of whether Article 7-C constitutes a "substantial impairment" of a contractual relationship, whether it was enacted to deal with "a broad, generalized economic or social problem" and whether it is of a character proportionate to its alleged purpose should be adjudicated by this Court, which has stated that the Contract Clause is "not a dead letter" and retains an "important place in our constitutional jurisprudence." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

V.

Article 7-C illegally delegates legislative power to the Loft Board, which is essentially an agency composed of private citizens.

The members of the Loft Board are in actuality no more than private citizens. They are appointed by the Mayor of the City of New York, pursuant to Section 282 of the Multiple Dwelling Law, which makes the point that they remain private citizens:

> The members of the loft board shall not be considered employees of the state or municipality, provided, however, that state or municipal employees may be named to the loft board.

The Loft Board has the power to require owners to change their premises from a commercial to a residential building, to expend funds to alter the premises to conform to residential requirements of state and municipal laws and regulations, to adjust rents, to set minimum housing and building standards, to fix procedures for subletting, to require owners to provide certain services, to impose fines against owners, to charge owners fees for all of its functions and to hold hearings with regard to the premises.

It is submitted that these activities of the Loft Board are beyond its powers, as its members are private citizens and are acting as such. Except for the courts, there is no other entity available to review the actions of the Loft Board.

This Court long ago held that private citizens have no power to act to affect adversely the use of land of other private citizens. *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928). Since none of the Loft Board members are public servants in their capacities as members of the Loft Board and there is no provision for review of their actions or their regulations and of their procedure, such entity should not have the power to destroy the value of the appellants' properties. As this Court stated in *Washington, supra*, "The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment."

CONCLUSION

For these reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

ALLEN GREEN
Counsel of Record
BELL, KALNICK, BECKMAN,
KLEE & GREEN
Attorneys for Appellants

March 12, 1987

APPENDIX A — MEMORANDUM DECISION OF THE COURT OF APPEALS, STATE OF NEW YORK

STATE OF NEW YORK
COURT OF APPEALS

1 No. 446

Spring Realty Co., et al.,

Appellants-Respondents,

v.

New York City Loft Board, et al.,

Respondents-Appellants,

and State of New York,

Defendant.

(446) Allen Green, NY City, for appellant.
Frederick A.O. Schwarz, Jr., NYC Corporation Counsel (Lee Fawkes & Stephen J. McGrath of counsel) for respondent.

MEMORANDUM.

The order of the Appellate Division should be modified in accordance with this memorandum, with costs to respondents-appellants, and as so modified, affirmed.

We agree with Special Term and the Appellate Division that Article 7-C of the Multiple Dwelling Law (Legalization of Interim Multiple Dwellings) is not in conflict with the Due Process Clauses

of the Fourteenth Amendment of the United States Constitution and Article 1, section 6 of the New York State Constitution. It is apparent from the legislative findings that the enactment is supported by a legitimate concern that loft buildings are being converted to residential use "without compliance with applicable building codes," that many of these buildings "do not conform to minimum standards for health, safety and fire protection," and that an "acute shortage of housing" already exists (MDL § 280). The statute establishes a reasonable means to effect these legislative concerns and is, therefore, a valid exercise of the police power (*Goldblatt v Town of Hempstead*, 369 US 590, 594-595; *Suffolk Outdoor Adv. v Hulse*, 43 NY2d 483, 489). We find no merit to the claim that the statute violates the Equal Protection Clauses of the state or federal constitutions (US Const, 5th, 14th amends; NY Const, art I, § 6; *see, e.g., McGowan v Maryland*, 366 US 420, 425; *8200 Realty Corp. v Lindsay*, 27 NY2d 124, 137), nor is there any showing that the statute, as applied to the particular properties of plaintiffs, contravenes the state or federal constitutions as a taking without just compensation (*see, e.g., Penn Central Transportation Co v New York City*, 438 US 104, 127-128; *Modjeska Sign v Berle*, 43 NY2d 468, 473-475, 477; *cf. Fred French Investing v City of New York*, 39 NY2d 587, *app dsmd* 429 US 990). There is no merit to plaintiffs' other attacks on the statute's validity.

Special Term erred, however, in ordering hardship hearings, because mandamus is an extraordinary remedy which lies only "to compel the performance of a purely ministerial act where there is a clear right to the relief sought" (*Matter of Legal Aid v Scheinman*, 53 NY2d 12, 16; *see Legal Aid v Ward*, 61 NY2d 744). Although the statute requires respondent Loft Board to resolve hardship applications, it does not require the Board to schedule hearings when it does so (*see*, Multiple Dwelling Law

Appendix A

§ 282). Thus, the remedy did not lie to compel the Loft Board to schedule hardship hearings, and that direction should be stricken.

* * *

Order modified, with costs to respondents-appellants, in accordance with the memorandum herein and, as so modified, affirmed. Chief Judge Wachtler and Judges Meyer, Simons, Kaye, Alexander, Titone and Hancock concur.

Decided December 16, 1986

APPENDIX B — ORDER OF APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 13, 1986

Present—Hon. Leonard H. Sandler, Justice Presiding
John Carro
Sidney H. Asch
Bentley Kassal
Ernst H. Rosenberg, Justices.

SPRING REALTY CO., DUANE THOMAS CO., 129 FRONT CO., DANIEL KATZ, EDWARD KATZ, 465 GREENWICH STREET ASSOCIATES, INC., V. PONTE & SONS INC., 77 HUDSON, INC., and E.E.E. HOLDING CORP.,

Plaintiffs-Appellants-Respondents,

-against- 25882

NEW YORK CITY LOFT BOARD, CITY OF NEW YORK,

Defendants-Respondents-Cross-Appellants,

-and-

STATE OF NEW YORK,

Defendant.

An appeal and cross-appeal having been taken to this Court

Appendix B

by the above-named appellants from an order and judgment (one paper) of the Supreme Court, New York County (William McCooe, J.), entered on July 8, 1985,

And said appeal and cross-appeal having been argued by Lee Fawkes of counsel for defendants-respondents-appellants, and by Allen Green of counsel for plaintiffs-appellants-respondents; and due deliberation having been had thereon,

It is unanimously ordered that the order and judgment (one paper) so appealed from be and the same hereby is affirmed, without costs and without disbursements.

ENTER:

HAROLD J. REYNOLDS

Clerk.

APPENDIX C — ORDER AND JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

At a Special Term, Part 1 of the Supreme Court of the State of New York, County of New York, held at the Courthouse, 60 Centre Street, New York, New York, on the 1st day of July, 1985.

P R E S E N T :

HON. WILLIAM P. McCOOE,

Justice.

SPRING REALTY CO., DUANE THOMAS CO., 129 FRONT CO., DANIEL KATZ, EDWARD KATZ, 465 GREENWICH STREET ASSOCIATES, INC., V. PONTE & SONS INC., 77 HUDSON, INC., and E.E.E. HOLDING CORP.,

Plaintiffs,

-against-

Index No. 4058/1984

NEW YORK CITY LOFT BOARD, CITY OF NEW YORK and STATE OF NEW YORK,

Defendants.

Upon reading and filing plaintiffs' notice of motion for summary judgment dated October 25, 1984, the affidavit of Allen Green, sworn to October 10, 1984, in support of the motion and exhibits annexed thereto, the affidavit of Seymour Cohn, sworn to October 10, 1984, in support of the motion, and exhibits

annexed thereto, the joint affidavit of Edward Katz and Daniel P. Katz, sworn to October 24, 1984, in support of the motion, the notice of cross-motion for summary judgment, dated December 28, 1984, the affirmation of Lee Fawkes, dated December 28, 1984, in support of the cross-motion, the affidavit of William Bernstein, sworn to December 28, 1984, in support of the cross-motion, and exhibits annexed thereto, the reply affidavit of Allen Green, sworn to January 2, 1985, in support of the motion, and upon the memorandum decision of this Court (McCooe, J.), it is

ORDERED, that plaintiffs' motion for summary judgment declaring Article 7-C of the Multiple Dwelling Law unconstitutional is denied, and it is further

ORDERED, that defendants' cross-motion for summary judgment declaring Article 7-C of the Multiple Dwelling Law constitutional is granted, and it is adjudged and declared that this article is constitutional and it is

ORDERED, that defendant, New York City Loft Board, is directed to promulgate the legalization regulations mandated by Article 7-C of the Multiple Dwelling Law relating to the necessary and reasonable costs of legalization of interim multiple dwellings within 120 days from the date of entry of this order and judgment and it is further

ORDERED, that defendant, New York City Loft Board, is directed to schedule hardship hearings within 120 days from the date of entry of this order and judgment.

ENTER

Appendix C

s/ William P. McCooe
WILLIAM P. McCOOE
J.S.C.

Filed July 8, 1985

APPENDIX D — OPINION OF SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

Index No. 4058/84
No. 160 1/3/85

SPRING REALTY CO., et al,

Plaintiffs,

-against-

NEW YORK CITY LOFT BOARD, CITY OF NEW YORK and STATE OF NEW YORK,

Defendants.

Plaintiff loft landlords move and defendants cross-move for summary judgment (CPLR 3212) in a declaratory judgment action (CPLR 3001) challenging Article 7-C of the Multiple Dwelling Law (Loft Law) and the regulations promulgated thereunder upon the ground that they are unconstitutional on their face and as applied to them.

The Loft Law was enacted as a comprehensive plan based upon a legislative finding of a serious public emergency created by the conversion of commercial and manufacturing loft buildings to residential use without compliance with local law; that there is an "acute shortage of housing"; that the courts have been burdened with disputes between the landlords and tenants over their respective rights and that legislation is necessary to insure minimum standards for health, safety and fire protection.

Loft premises were being illegally occupied for residential purposes under commercial leases with the knowledge of the

landlords and many tenants had made substantial improvements to the space to make it suitable for residential occupancy. This law gave the tenants status as rent stabilized tenants and the landlords the right to collect rent and commence summary proceedings in the absence of the previously required certificate of occupancy while the property was being brought into compliance with the residential building code.

The Loft Law provides for the creation of a Loft Board which is mandated to promulgate rules and regulations to implement the statutory requirements for loft conversions. The landlord is required to perform the work necessary to bring the building up to residential code compliance and is entitled to rent adjustments, one based upon the cost of compliance with health and safety standards and a second based upon the procurement of a residential certificate of occupancy. The Loft Board is required to promulgate a schedule of renovating costs necessarily and reasonably incurred by the landlord, including financing costs, and permits those costs to be passed along to the tenant over either a ten or fifteen year period. A landlord may apply to the Loft Board for a hardship exemption of the building on the ground that the cost of compliance renders legal residential conversion financially "infeasible" based upon the absence of a pro- jected "reasonable" return of 5% or where conversion would adversely affect another non-residential tenant.

A tenant is entitled to sell any improvements made in the unit upon vacating the premises to an incoming tenant with the landlord having the right of first refusal. The Loft Board is required to promulgate rules and regulations regarding such sale. A purchase by the landlord may make the subsequent leases at free market rents depending upon the number of units and unless the building is subject to rent regulation by virtue of some other statutory provision.

Appendix D

On December 21, 1982, the Loft Board issued Interim Rent Guidelines applicable where leases had expired. The guidelines permit consideration of escalation clauses, including but not limited to real estate taxes, heating fuel, labor, water and sewer, insurance, vault tax and any cost-of-living increase formulas, but excluding gas, electricity and steam charges. Landlords were given increases of (a) 7% where the last increase was subsequent to December 31, 1979, (b) 22 per cent where the last increase was between 1977 and 1979 and (c) 33 per cent when the last increase was prior to January 1977. Additional surcharges of 2, 4 and 6 per cent respectively, for categories, a, b and c above are permitted where the most recent lease did not contain an escalator provision.

Plaintiffs' claim of unconstitutionality is primarily based on the economic impact of the legislation on their property. They contend that this law imposes a duty on them to legalize commercial property for residential purposes at great personal expense against their will without any guarantee that they will be able to secure adequate financing for such renovation or that the rentals fixed by the Rent Guidelines Board will not adequately compensate them for their investment or guarantee that the tenants will remain in possession of the premises after their investment is made. They further contend that this legislation authorizes unreasonably low rents which deprives them of a meaningful return, places a restriction on the use they make of their property and that the retroactive nature and effect of the law is legally impermissible. Finally, they contend that the power to determine the "necessary and reasonable" cost of legalization which may be passed on to the tenants is an impermissible delegation of legislative power to the Board and in any event the Board has failed to promulgate regulations which define and determine such costs.

Appendix D

The administrative deficiencies claimed are the failure to secure outside financing for the conversions, the failure to process any hardship applications and the failure to promulgate the rules and regulations mandated by the Act.

They contend that Art. 7-C constitutes an impairment of contracts under Art. I, Sec. 10 of the United States Constitution, constitutes a taking of private property without just compensation under the 5th and 14th Amendments of the United States Constitution and Art. I, Sec. 7 of the New York Constitution and violates the due process and equal protection clauses under the Fourteenth Amendment of the United States Constitution and Art. I, Sec. 6 of the New York Constitution.

The judicial branch of government has a defined role in reviewing the actions of the legislative branch of government. Its role is limited by the "simple, but well founded presumption that an act of the Legislature is constitutional and this presumption can be upset only by proof persuasive beyond a reasonable doubt". Hotel Dorset Co. v. Trust for Cultural Resources, 46 N.Y.2d 358, 370; Cook v. City of Binghamton, 48 N.Y.2d 323. The legislative findings that motivated the enactment of the statute indicate its legitimate concern with health, safety and reasonable rentals for both landlords and tenants and a Court should not substitute its judgment as to solutions and remedies where the legislation is reasonably related to the condition. I.L.F.Y. Co. v. City Rent & Rehab. Adm., 11 N.Y.2d 480, 489. The test is whether the means adopted by the legislature to carry out its avowed purposes was reasonable under the circumstances and not whether it was the "wisest" course of action. Nebbia v. New York, 291 U.S. 502. This law is a valid exercise of the State's police power and does not offend either the Fourteenth Amendment to the U.S. Constitution or N.Y.Const., Art. 9 , Sec. 2(b) 2,; Lipkis v. Pikus,

Appendix D

122 Misc.2d 136, 145, revd. on other grounds, 103 A.D.2d 682; Goldblatt v. Town of Hempstead, 369 U.S. 590; I.L.F.Y. Co. v. City Rent & Rehab. Adm., supra, at 489.

The exercise of the state police power may properly place restrictions on the use or return on properly property if it is reasonably related to a legitimate public purpose. Golden v. Planning Board of Ramapo, 30 N.Y.2d 359, 381, app. dism. 409 U.S. 1003; Society for Ethical Culture v. Spoat, 68 A.D.2d 112, aff'd 51 N.Y.2d 449. A taking in the constitutional sense only occurs when the owner is deprived of any use of the property for which it is reasonably adapted, rather than merely restricting its use or depreciating its value. Spears v. Berle, 48 N.Y.2d 254, 263; Fred French Investing Co. v. City of New York, 39 N.Y.2d 587, 596, app. dism. 429 U.S. 990, Seidner v. Town of Islip, 56 N.Y.2d 1004 and Jensen v. City of N.Y. 42 N.Y.2d 1079 are readily distinguishable since the plaintiffs were deprived of "all" use of the property. A proper exercise of the police power is not invalidated by its imposition of financial burdens upon the affected parties. Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421, 424; Levitt v. Village of Sands Point, 16 N.Y.2d 269, 273. There is no constitutional right to any particular rate of return on property. Bucho Holding Co. v. Temporary State Housing Rent Commission, 11 N.Y.2d 469. A 6% return was sustained in Felner v. Office of Rent Control, 27 N.Y.2d 692.

The Loft Law attempts to strike a balance between the financial interests of loft owners and tenants by regulating both the rent levels prior to the owner's compliance with occupancy standards and providing for "pass through" from owner to tenant of the costs reasonable and necessary incurred by the owner in achieving compliance. The pre-compliance rentals leave existing leases undisturbed and provide for varying rent increases on

renewal leases upon building registration as well as rent escalation for utility charges. The Loft Law deals with compliance costs by providing those costs "necessarily and reasonably incurred" by owners will be passed along to tenants. This statutory language provides a sufficient standard so as to validate the delegation of legislative discretionary power to an administrative agency. 241 East 22nd Street Corp. v. City Rent Agency, 33 N.Y.2d 134, 143.

Plaintiffs contend that the Loft Law denies them equal protection under the U.S. and State Constitutions. A law that treats citizens differently than others is violative of the equal protection clause only if the classification rests on grounds wholly irrelevant to the legislative purpose and it will not be set aside if any state of facts can reasonably justify it. McGowan v. Maryland, 366 U.S. 420, 425. The present legislative classification is reasonably related to several legitimate public purposes and passes constitutional muster. The classification is neither "wholly irrelevant", McGowan, v. Maryland, supra, nor "patently arbitrary", Frontiero v. Richardson, 411 U.S. 677, 683, but instead distinguishes commercial buildings with loft tenants from others because the loft occupancy has endangered public health and safety and has created chaotic and unsettled legal problems.

Plaintiffs further contend that the Loft Law constitutes an impairment of contractual obligations under Article I, Sec. 10 of the U.S. Const. with respect to the existing leases with plaintiffs' tenants. Assuming such fact to be true, the Loft Law is a valid exercise of the police power under a declared housing emergency and is constitutional since it serves an important purpose for the general welfare. Freeport Randall Co. v. Herman, 83 A.D.2d 812, 813.

This Court has previously passed on the retroactive nature

of the challenged law and has found it legally permissible for the reasons stated therein. 465 Greenwich Street Associates Inc. v. Schmidt, 116 Misc.2d 62; Lipkis v. Pikus, supra.

The Court finds that the Loft Law is facially constitutional for the reasons stated.

The second branch of the motion is directed towards the alleged unconstitutionality of Article 7-C as administratively applied to plaintiffs. An Article 78 is the proper vehicle to determine whether the statute and regulations are being unconstitutionally applied but an improper form for the relief sought is correctible and the Court will consider the arguments advanced. Matter of Kovarsky v. Housing and Development Administration, 31 N.Y.2d 184, 192.

The thrust of plaintiffs' arguments is that the Board has failed to act on any hardship applications or to promulgate regulations such as defining "necessary and reasonable" costs of legalization and the "buy out" provisions as required under the Act. The plaintiffs are aggrieved parties and are entitled to relief. The Act specifically directs the performance of these acts which the defendants have failed to do. The defendant is directed to comply with Article 7-C by promulgating schedules mandated by the Act and to commence holding hardship hearings within 120 days of the date of the settlement of this Order. The Act specifically directs the Board to promulgate regulations and to hold hardship hearings. These provisions are mandatory and not directory since they are essential to the implementation of the Act and should be strictly construed. 1 McKinneys, Sec. 171 including time for performance. Mandamus may be used to compel performance of an act required to be done by provision of law. Matter of Sullivan v. Siebert, 70 A.D.2d 975; Matter of Silk & Bunks, P.C. v. Greenfield, 102

A.D.2d 734 and where "the act sought to be compelled is ministerial, non-discretionary and non-judgmental and is premised upon specific statutory authority mandating performance in a specified manner." Matter of Peirez v. Caso, 72 A.D.2d 797, and where there is an inordinate delay in acting. Matter of Stuart & Stuart Inc. v. New York State Liquor Authority. 29 A.D.2d 176.

There is an inordinate delay in acting in the instant case. The law is almost three years old and there is no legitimate reason given for the failure to promulgate the regulations. A reasonable time to act is presumed when there is no specific time given. Three years is not reasonable and any delay in appointing the Loft Board is no legal justification for the delay.

Plaintiffs further claim that they may not be able to obtain financing or keep the premises rented. These arguments are not cognizable since they are merely speculative, conjectural and premature. Prashker v. United States Guaranty Co., 1 N.Y. 584. Furthermore, these issues are factually disputed by defendant which precludes summary judgment.

Plaintiffs' motion for summary judgment declaring Art. 7-C unconstitutional is denied. Defendant's cross motion for summary judgment declaring Art. 7-C constitutional is granted.

Defendant is directed to promulgate regulations mandated by the Loft Law and schedule hardship hearings within 120 days from the date of settlement of this Order. The proposed Orders shall list precisely which mandated regulations have not been promulgated to date.

Settle Order.

Appendix D

Dated: March 28, 1985.

s/ William P. McCooe
WILLIAM P. McCOOE
J.S.C.

Filed July 30, 1985

APPENDIX E — ORDER OF THE COURT OF APPEALS, STATE OF NEW YORK

The Hon. Sol Wachtler, Chief Judge, Presiding

1 No. 446

Spring Realty Co., et al.,

Appellants-Respondents,

v.

New York City Loft Board, et al.,

Respondents-Appellants,

-and-

State of New York,

Defendant.

The appellant(s) in the above entitled appeal appeared by Bell, Kalnick, Beckman, Klee and Green, Esqs.; the respondent(s) appeared by Hon. Frederick A. O. Schwarz, Jr., Corporation Counsel, City of New York.

The Court, after due deliberation, orders and adjudges that the order is modified, with costs to respondents-appellants, in accordance with the memorandum herein and, as so modified, affirmed. Chief Judge Wachtler and Judges Meyer, Simons, Kaye, Alexander, Titone and Hancock, concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York there to be proceeded upon

Appendix E

according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/ Donald M. Sheraw
Donald M. Sheraw,
Clerk of the Court

Court of Appeals, Clerk's Office,
Albany, December 16, 1986

APPENDIX F — NOTICE OF APPEAL

COURT OF APPEALS
STATE OF NEW YORK

SPRING REALTY CO., DUANE THOMAS CO., 129 FRONT CO., DANIEL KATZ, EDWARD KATZ, 465 GREENWICH STREET ASSOCIATES, INC., V. PONTE & SONS, INC., 77 HUDSON, INC. and E.E.E. HOLDING CORP.,

Appellants,

-against-

NEW YORK CITY LOFT BOARD, CITY OF NEW YORK, and STATE OF NEW YORK,

Respondents.

NOTICE OF APPEAL

Notice is hereby given that Spring Realty Co., Duane Thomas Co., 129 Front Co., Daniel Katz, Edward Katz, 465 Greenwich Street Associates, Inc., V. Ponte & Sons, Inc., 77 Hudson, Inc. and E.E.E. Holding Corp., the appellants above-named, hereby appeal to the Supreme Court of the United States from that portion of the judgment of the Court of Appeals of the State of New York, entered on December 16, 1986, affirming the order of the Appellate Division, First Department, Supreme Court of the State of New York, which affirmed the order and judgment of Supreme Court of the State of New York, County of New York (New York County Clerk's Index Number 4058/1984) which adjudged the complaint be dismissed and declared that Article 7-C of the New York Multiple Dwelling Law is constitutional.

Appendix F

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: New York, New York
February 27, 1987

Yours etc.,

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TO:

PETER ZIMROTH
Corporation Counsel
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Appendix F

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(Filed with New York Court of Appeals on March 3, 1957 and with County Clerk, New York County on March 2, 1987)

APPENDIX G — AFFIRMATION OF ALLEN GREEN

COURT OF APPEALS
STATE OF NEW YORK

SPRING REALTY CO., DUANE THOMAS CO., 129 FRONT CO., DANIEL KATZ, EDWARD KATZ, 465 GREENWICH STREET ASSOCIATES, INC., V. PONTE & SONS, INC., 77 HUDSON, INC. and E.E.E. HOLDING CORP.,

Appellants,

-against-

NEW YORK CITY LOFT BOARD, CITY OF NEW YORK, and STATE OF NEW YORK,

Respondents.

AFFIRMATION

ALLEN GREEN, an attorney duly admitted to practice law before the Courts of thia state, hereby affirms under the penalties of perjury as follows:

On February 27, 1987, I served a copy of the within Notice of Appeal to the United States Supreme Court, upon the offices of the following individuals by placing said Notice of Appeal in a securely wrapped postage pre-paid envelope addressed to the said offices at the aforesaid address, and thereafter by first class mail, mailed it in the envelope containing the said Notice of Appeal:

Appendix G

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s/ Allen Green
ALLEN GREEN

APPENDIX H — STATUTORY PROVISIONS INVOLVED

ARTICLE 7-C—LEGALIZATION OF INTERIM MULTIPLE DWELLINGS

§ 280. Legislative findings

The legislature hereby finds and declares that a serious public emergency exists in the housing of a considerable number of persons in cities having a population of over one million which emergency has been created by the increasing number of conversions of commercial and manufacturing loft buildings to residential use without compliance with applicable building codes and laws and without compliance with local laws regarding minimum housing maintenance standards; that many such buildings do not conform to minimum standards for health, safety and fire protection; that housing maintenance services essential to maintain health, safety and fire protection are not being provided in many such buildings; that as a consequence of the acute shortage of housing as found and declared in the emergency tenant protection act of nineteen seventy-four the tenants in such buildings would suffer great hardship if forced to relocate; that as a result of the uncertain status of the tenancy in question the courts have been increasingly burdened with disputes between landlords and tenants regarding their respective rights and obligations under the existing circumstances; that some courts have declared such buildings "de facto" multiple dwellings; that illegal and unregulated residential conversions undermine the

integrity of the local zoning resolution and threaten loss of jobs and industry; that the intervention of the state and local governments is necessary to effectuate legalization, consistent with the local zoning resolution, of the present illegal living arrangements in such "de facto" multiple dwellings, and to establish a system whereby residential rentals can be reasonably adjusted so that residential tenants can assist in paying the cost of such legalization without being forced to relocate; that in order to prevent uncertainty, hardship, and dislocation, the provisions of this article are necessary and designed to protect the public health, safety and general welfare.

§ 281. Definition of "interim multiple dwelling"

1. Except as provided in subdivision two of this section, the term "interim multiple dwelling" means any building or structure or portion thereof located in a city of more than one million persons which (i) at any time was occupied for manufacturing, commercial, or warehouse purposes; and (ii) lacks a certificate of compliance or occupancy pursuant to section three hundred one of this chapter; and (iii) on December first, nineteen hundred eighty-one was occupied for residential purposes since April first, nineteen hundred eighty as the residence or home of any three or more families living independently of one another.

2. Notwithstanding the definition set forth in

subdivision one of this section, the term "interim multiple dwelling" includes only (i) buildings, structures or portions thereof located in a geographical area in which the local zoning resolution permits residential use as of right, or by minor modification or administrative certification of a local planning agency, (ii) buildings or structures which are not owned by a municipality, (iii) buildings, structures or portions thereof within an area designated by the local zoning resolution as a study area for possible rezoning to permit residential use, or (iv) buildings, structures or portions thereof which may be converted to residential use pursuant to a special permit granted by a local planning agency. In the case of classes of buildings specified by paragraphs (iii) and (iv) of this subdivision and those buildings specified by paragraph (i) of this subdivision which require a minor modification or administrative certification, however, the provisions of subdivision one of section two hundred eighty-four of this article regarding compliance with this chapter shall not be applicable, but the other provisions of this article shall be applicable. Upon rezoning of any such study area or the granting of any such special permit, minor modification or administrative certification to permit residential use of any such building or portion thereof, subdivision one of section two hundred eighty-four of this article shall be applicable, with the timing of compliance requirements set forth in such section commencing to run upon the effective date of such rezoning or permit approval. If such rezoning does

not permit residential use of the building or a portion thereof, or if a special permit, minor modification or administrative certification is denied, such building shall be exempt from this article.

3. In addition to the residents of an interim multiple dwelling, residential occupants in units first occupied after April first nineteen hundred eighty and prior to April first, nineteen hundred eighty-one shall be qualified for protection pursuant to this article, provided that the building or any portion thereof otherwise qualifies as an interim multiple dwelling, and the tenants are eligible under the local zoning resolution for such occupancy. A reduction in the number of occupied residential units in a building after December first, nineteen hundred eighty-one shall not eliminate the protections of this article for any remaining residential occupants qualified for such protections. Non-residential space in a building as of the effective date of the act which added this article shall be offered for residential use only after the obtaining of a residential certificate of occupancy for such space, and such space shall be exempt from this article, even if a portion of such building may be an interim multiple dwelling.

§ 282. Establishment of special loft unit

In order to resolve complaints of owners of interim multiple dwellings and of residential occupants of such buildings qualified for the

protection of this article, and to act upon hardship applications made pursuant to this article, a special loft unit referred to herein as the "loft board" shall be established which shall consist of from four to nine members representative of the public, the real estate industry, loft residential tenants, and loft manufacturing interests, and a chairperson, all to be appointed by the mayor of the municipality and to serve such terms as he may designate. The compensation of the members of the loft board shall be fixed by the mayor. The members of the loft board shall not be considered employees of the state or the municipality, provided, however, that state or municipal employees or officers may be named to the loft board. The mayor shall establish the loft board within ninety days of the effective date of the act which added this article. The loft board shall have such office and staff as shall be necessary to carry out functions conferred upon it and may request and receive assistance from any state or municipal agency or department. The loft board shall have the following duties: (a) the determination of interim multiple dwelling status and other issues of coverage pursuant to this article; (b) the resolution of all hardship appeals brought under this article; (c) the determination of any claim for rent adjustment under this article by an owner or tenant; (d) the issuance, after a public hearing, and the enforcement of rules and regulations governing minimum housing maintenance standards in interim multiple dwellings (subject to the provisions of this chapter and any local building code), rent

adjustments prior to legalization, compliance with this article and the hearing of complaints and applications made to it pursuant to this article; and (e) determination of controversies arising over the fair market value of a residential tenant's fixtures or reasonable moving expenses. The violation of any rule or regulation promulgated by the loft board shall be punishable by a civil penalty determined by the loft board not to exceed one thousand dollars which may be recovered by the municipality by a proceeding in any court of competent jurisdiction. The loft board may charge and collect reasonable fees in the execution of its responsibilities. The loft board may administer oaths, take affidavits, hear testimony, and take proof under oath at public or private hearings.

§ 284. Owner obligations

1. (i) The owner of an interim multiple dwelling (A) shall file an alteration application within nine months from the effective date of the act which added this article, and (B) shall take all reasonable and necessary action to obtain an approved alteration permit within twelve months from such effective date and (C) shall achieve compliance with the standards of safety and fire protection set forth in article seven-B of this chapter for the residential portions of the building within eighteen months from obtaining such alteration permit or eighteen months from such effective date, whichever is later, and (D) shall take all reasonable and necessary action to obtain a

certificate of occupancy as a class A multiple dwelling for the residential portions of the building or structure within thirty-six months from such effective date. The loft board may, upon good cause shown, and upon proof of compliance with the standards of safety and fire protection set forth in article seven-B of this chapter, twice extend the time of compliance with the requirement to obtain a residential certificate of occupancy for periods not to exceed twelve months each.

(ii) If there is a finding by the loft board that an owner has failed to satisfy any requirement specified in paragraph (i) of this subdivision, such owner shall be subject to all penalties set forth in article eight of this chapter.

(iii) In addition to the penalties provided in article eight of this chapter, if there is a finding by the loft board that an owner has failed to satisfy any requirement specified in paragraph (i) of this subdivision, a court may order specific performance to enforce the provisions of this article upon the application of three occupants of separate residential units qualified for the protection of this article, or upon the application of the municipality.

(iv) If, as a consequence of an owner's unlawful failure to comply with the provisions of paragraph (i) of this subdivision any residential occupant qualified for protection pursuant to this article is required to vacate his unit as a result of

a municipal vacate order, such occupant may recover from the owner the fair market value of any improvements made by such tenant, and reasonable moving costs. Any vacate order issued as to such unit by a local government shall be deemed an order to the owner to correct the non-compliant conditions, subject to the provisions of this article. Furthermore, when such correction has been made such occupant shall have the right to re-occupy his unit, and shall be entitled to all applicable tenant protections of this article.

(v) The occupants of a building shall, upon appropriate notice regarding the timing and scope of the work required, afford the owner reasonable access to their units so that the work necessary for compliance with this article can be carried out. Failure to comply with an order of the loft baord regarding access shall be grounds for eviction of a tenant.

2. Every owner of an interim multiple dwelling, every lessee of a whole building part of which is an interim multiple dwelling, and every agent or other person having control of such a dwelling, shall, within sixty days of the effective date of the act which added this article, file with the loft board or any other authority designated by the mayor a notice in conformity with all provisions of section three hundred twenty-five of this chapter and with rules and regulations to be promulgated by the loft board.

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§ 285. Owner Protection

1. Notwithstanding the provisions of section three hundred two or three hundred twenty-five of this chapter, the owner of an interim multiple dwelling may recover rent payable from residential occupants qualified for the protection ofthis article on or after April first, nineteen hundred eighty, and maintain an action or proceeding for possession of such premises for non-payment of rent, provided that he is in compliance with this article.

2. Notwithstanding any other provision of this article, an owner may apply to the loft board for exemption of a building or portion thereof from this article on the basis that compliance with this article in obtaining a legal residential certificate of occupancy would cause an unjustifiable hardship either because: (i) it would cause an unreasonably adverse impact on a non-residential conforming use tenant within the building or, (ii) the cost of compliance renders legal residential conversion infeasible. Residential and other tenants shall be given not less than sixty days notice in advance of the hearing date for such application. If the loft board approves such application, the building or portion thereof shall be exempt from this article, and may be converted to non-residential conforming uses, provided, however, that the owner shall, as a condition of approval of such application, agree to file an irrevocable recorded covenant in form satisfactory to the loft

board enforceable for fifteen years by the municipality, that the building will not be re-converted to residential uses during such time. The standard for granting such hardship application for a building or portion thereof shall be as follows: (a) the loft board shall only grant the minimum relief necessary to relieve any alleged hardship with the understanding if compliance is reasonably possible it should be achieved even if it requires alteration of units, relocation of tenants to vacant space within the building, re-design of space or application for a non-use-related variance, special permit, minor modification or administrative certification; (b) self-created hardship shall not be allowed; (c) the test for cost infeasibility shall be that of a reasonable return on the owner's investment not maximum return on investment; (d) the test for unreasonably adverse impact on a non-residential conforming use tenant shall be whether residential conversion would necessitate displacement. Such hardship applications shall be submitted to the loft baord within nine months of the establishment of the loft board, but shall not be considered absent a waiver by the loft board, unless the owner has also filed an alteration application. In determination of any such hardship application, the loft board may demand such information as it deems necessary. In approving any such hardship application, the loft board may fix reasonable terms and conditions for the vacating of residential occupancy.

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§ 286. Tenant protection

1. It shall not be a ground for an action or proceeding to recover possession of a unit occupied by a residential occupant qualified for the protection of this article that the occupancy of the unit is illegal or in violation of provisions of the tenant's lease or rental agreement because a residential certificate of occupancy has not been issued for the building, or because residential occupancy is not permitted by the lease or rental agreement.

2. Prior to compliance with safety and fire protection standards of article seven-B of this chapter, residential occupants qualified for protection pursuant to this article shall be entitled to continued occupancy, and shall pay the same rent, including escalations, specified in their lease or rental agreement to the extent to which such lease or rental agreement remains in effect or, in the absence of a lease or rental agreement, the same rent most recently paid and accepted by the owner; if there is no lease or other rental agreement in effect, rent adjustments prior to article seven-B compliance shall be in conformity with guidelines to be set by the loft board for such residential occupants within six months from the effective date of this article.

3. Upon or after compliance with the safety and fire protection standards of article seven-B of this chapter, an owner may apply to the loft board

for an adjustment of rent based upon the cost of such compliance. Upon approval by the loft board of such compliance, the loft board shall set the initial legal regulated rent, and each residential occupant qualified for protection pursuant to this article shall be offered a residential lease subject to the provisions regarding evictions and regulation of rent set forth in the emergency tenant protection act of nineteen seventy-four, except to the extent the provisions of this article are inconsistent with such act. At such time, the owners of such buildings shall join a real estate industry stabilization association in accordance with such act.

4. The initial legal regulated rent established by the loft board shall be equal to (i) the rent in effect, including escalations, as of the date of application for adjustment ("base rent"), plus (ii) the maximum annual amount of any increase allocable to compliance as provided herein; and (iii) the percentage increase then applicable to one, two or three year leases as elected by the tenant, as established by the local rent guidelines board, and applied to the base rent, provided, however, such percentage increases may be adjusted downward by the loft board if prior increases based on loft board guidelines cover part of the same time period to be covered by the rent guidelines board adjustments.

5. An owner may apply to the loft board for rent adjustments once based upon the cost of

compliance with article seven-B of this chapter and once based upon the obtaining of a residential certificate of occupany. If the initial legal regulated rent has been set based only upon article seven-B compliance, a further adjustment may be obtained upon the obtaining of a residential certificate of occupancy. Upon receipt of such records as the loft board shall require, the loft board shall determine the costs necessarily and reasonably incurred, including financing, in obtaining compliance with this article pursuant to a schedule of reasonable costs to be promulgated by it. The adjustment in maximum rents for compliance with this article shall be determined either (i) by dividing the amount of the cash cost of such improvements exclusive of interest and service charges over a ten year period of amortization, or (ii) by dividing the amount of the cash cost of such improvements exclusive of interest and service charges over a fifteen year period of amortization, plus the actual annual mortgage debt service attributable to interest and service charges in each year of indebtedness to an institutional lender, or other lender approved by the loft board, incurred by the owner to pay the cash cost of the improvements, provided that the maximum amount of interest charged includable in rent shall reflect an annual amortization factor of one-fifteenth of the outstanding principal balance. Rental adjustments to each residential unit shall be determined on a basis approved by the loft board. An owner may elect that the loft board shall deem the total cost of compliance with this article to be the amounts

certified by the local department of housing preservation and development of such municipality in any certificate of eligibility issued in connection with an application for tax exemption or tax abatement to the extent such certificate reflects categories of costs approved by the loft board as reasonable and necessary for such compliance. Rental adjustments attributable to the cost of compliance with this article shall not become part of the base rent for purposes of calculating rents adjusted pursuant to rent guidelines board increases.

6. Notwithstanding any provision of law to the contrary, a residential tenant qualified for protection pursuant to this chapter may sell any improvements to the unit made or purchased by him to an incoming tenant provided, however, that the tenant shall first offer the improvements to the owner for an amount equal to their fair market value. Upon purchase of such improvements by the owner, any unit subject to rent regulation solely by reason of this article and not receiving any benefits of real estate tax exemption or tax abatement, shall be exempted from the provisions of this article requiring rent regulation if such building had fewer than six residential units as of the effective date of the act which added this article, or rented at market value subject to subsequent rent regulation if such building had six or more residential units at such time. The loft board shall establish rules and regulations regarding such sale of improvements which shall

include provisions that such right to sell improvements may be exercised only once for each unit subject to this article, and that the opportunity for decontrol or market rentals shall not be available to an owner found guilty by the loft board of harassment of tenants.

7. The local rent guidelines board shall annually establish guidelines for rent adjustments for the category of buildings covered by ths article in accordance with the standards established pursuant to the emergency tenant protection act of nineteen seventy-four. The local rent guidelines board shall consider the necessity of a separate category for such buildings, and a separately determined guideline for rent adjustments for those units in which heat is not required to be provided by the owner, and may establish such separate category and guideline. The loft board shall annually commission a study by an independent consultant to assist the rent guidelines board in determining the economics of loft housing.

8. Cooperative and condominium units occupied by owners or tenant-shareholders shall not be subject to rent regulation pursuant to this artic'e.

9. No eviction plan for conversion to cooperative or condominium ownership for a building which is, or a portion of which is an interim multiple dwelling shall be submitted for filing to the department of law pursuant to the

general business law until a residential certificate of occupancy is obtained as required by this article, and the residential occupants qualified for protection pursuant to this article are offered one, two or three year leases, as elected by such persons, in accordance with the provisions for establishment of initial legal regulated rent contained herein. Non-eviction plans for such buildings may be submitted for filing only if the sponsor remains responsible for compliance with article seven-B and for all work in common areas required to obtain a residential certificate of occupancy. Cooperative conversion shall be fully in accordance with section three hundred fifty-two-eeee of the general business law, the requirements of the code of the local real estate industry stabilization association, and with the rules and regulations promulgated by the attorney general.

10. The functions of the local conciliation and appeals board of such municipality regarding owners and tenants subject to rent regulation pursuant to this article shall be carried out by the loft board until such time as provided otherwise by local law.

11. Residential occupants qualified for protection pursuant to this article shall be afforded the protections available to residential tenants pursuant to the real property law and the real property actions and proceedings law.

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12. No waiver of rights pursuant to this article by a residential occupant qualified for protection pursuant to this article made prior to the effective date of the act which added this article shall be accorded any force or effect; however, subsequent to the effective date an owner and a residential occupant may agree to the purchase by the owner of such person's rights in a unit.

13. The applicability of the emergency tenant protection act of nineteen seventy-four to buildings occupied by residential tenants qualified for protection pursuant to this article shall be subject to a declaration of emergency by the local legislative body. In the event such act expires prior to the expiration of this article, tenants in interim multiple dwellings shall be included in coverage of the rent stabilization law of nineteen hundred sixty-nine of the city of New York.

§ 287. Alternative compliance

In any case in which a local building code or this chapter provides an alternative means of meeting the fire and safety standards of article seven-B of this chapter, an owner of an interim multiple dwelling may, to the extent permitted by such local code or this chapter, elect to comply with the standards of such code or this chapter rather than with article seven-B. Such an election shall not affect an owner's obligations to meet the deadlines for compliance set forth in this article, and in such cases references herein to article seven-

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B shall be deemed to include any such local building code or the applicable provisions of this chapter.